Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 130—October Term, 1955.

(Argued January 19, 1956 Decided February 6, 1956.)

Docket No. 23721

LUIS ALVARO CEBALLOS (Y ARBOLEDA),

Plaintiff-Appellant,

—v.—

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York,

Defendant-Appellee.

Before:

MEDINA, HINCKS and WATERMAN,

Circuit Judges.

Appeal from a decision and order of the District Court of the United States for the Southern District of New York. Irving R. Kaufman, *Judge*.

Plaintiff appeals from the District Court's dismissal of his complaint for failure to join an indispensable party. Opinion reported in 130 F. Supp. 30. Affirmed.

Opinion

BLANCH FREEDMAN and GLORIA AGRIN, New York City, *for plaintiff-appellant.*

PAUL W. WILLIAMS, New York City (Harold J. Raby and Maurice N. Nessen, New York City, of counsel), *for defendant-appellee.*

MEDINA, Circuit Judge:

Plaintiff, an alien, seeks *inter alia* a declaratory judgment that he is not ineligible for naturalization under 8 U. S. C. A. §155(c) (1950 Cum. Pocket Part) and, in effect, a stay of deportation until the Attorney General exercises his discretion with respect to plaintiff's application for suspension of deportation. The complaint, brought against the District Director of Immigration, was dismissed below on the procedural ground that the Attorney General or the Commissioner of Immigration and Naturalization was an indispensable party.

Judge Kaufman followed and elaborated upon the distinction we made in *Pedreiro* v. *Shaughnessy*, 2 Cir., 213 F. 2d 768, aff'd, 349 U. S. 48, between a challenge to deportability, as in *Pedreiro*, and a claim that, notwithstanding deportability, the Attorney General should exercise his discretion in favor of the issuance of an order suspending deportation, as in *Vaz* v. *Shaughnessy*, 2 Cir., 208 F. 2d 70 and in the case now before us. Although the question is not free from doubt, we shall follow our reasoning in *Vaz* and more fully stated in the opinion below. While the Supreme Court may decide that the distinction no longer holds, we do not think this is to be spelled out of Mr. Justice Black's opinion in *Pedreiro*.

In any event, the decision below must be affirmed because, as a matter of law, plaintiff is not entitled to the

relief he requests. For 8 U. S. C. A. §155(*c*) (1950 Pocket Part) permits his application for suspension of deportation to be considered only if he is eligible for citizenship. Plaintiff, however, admits that he signed a DSS Form 301: Application by Alien for Relief from Military Service. Plaintiff heard nothing further from his Draft Board until his country of citizenship became a belligerent and he was, consequently, no longer entitled to claim exemption as a neutral alien. Whether this was cause or coincidence, as the defendant and plaintiff respectively contend, is not material. Section 303(a) of Title 50 of the United States Code, Appendix provides that an alien who "has made application" to be relieved from military service "shall thereafter be debarred from becoming a citizen of the United States," and plaintiff made such an application and hence is not eligible for an order suspending deportation.

Affirmed.

Judgment

(Filed—February 6, 1956)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of February, one thousand nine hundred and fifty-six.

Present:

HON. HAROLD R. MEDINA,
HON. CARROLL C. HINCKS,
HON. STERRY R. WATERMAN,

Circuit Judges.

LUIS ALVARO CEBALLOS (I. ARBOLEDA),

Plaintiff-Appellant,

vs.

EDWARD J. SHAUGHNESSY, District Director, etc.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO,
Clerk.